2007

State of Utah v. Mark Scott : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	*	
	*	
Plaintiff / Appellee	*	
	*	
vs.	*	Appellate Case No. 20070740-CA
	*	
MARK SCOTT	*	
Defendant / Appellant	*	

BRIEF OF APPELLANT

THIS APPEAL OF A TRIAL HELD IN THE FIRST JUDICIAL DISTRICT COURT. THE HONORABLE GORDON J. LOW PRESIDED OVER THE CASE.

APPELLANT IS CURRENTLY INCARCERATED IN THE UTAH STATE PRISON.
APPELLANT REQUESTS ORAL ARGUMENT

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

The defendant was charged with eight crimes: four counts of Burglary, second degree felonies and four counts of Theft. Two counts are Second Degree felonies and two counts Class B misdemeanors.

The defendant was convicted on all counts. The Court sentenced the defendant to a term of one to fifteen years in the Utah State Prison on the second degree felonies and six months in the Cache County jail on the Class B misdemeanors. The Court ordered the sentences to run concurrent.

This Court has jurisdiction over this appeal pursuant to U.C.A. 78A-4-103(2)(J)

ISSUE ON APPEAL AND STANDARD OF REVIEW

Issue: I. The trial court erred when they failed to grant the defendant's motion to dismiss the case based upon the state failing to prevent sufficient evidence that the defendant was involved in the crimes.

Standard of Review regarding challenges to Witnesses. The application of these rules by the trial court is reviewed under an abuse-of-discretion standard. *State v. Hovater*, 914 P. 2d 37, 41 (Utah 1996)

Standard of Review regarding Findings of Fact is reviewed under a clearly erroneous, *State v. Genovesi*, 871 P. 2d 547 (Utah App. 1994)

Issue: II Was the trial counsel ineffective for failing to file a motion to arrest the judgment.

STANDARD OF REVIEW: The appellate court must determine as a matter of fact and law whether the Defendant was denied his right to effective assistance of counsel. In *Strickland v. Washington*, 466 U.S 668, 80 L.Ed.2d 674 (1984), the United States Supreme Court articulated a two part test, which was adopted in *State v. Templin, 805 P.2d 182 (Utah 1990)*, to determine whether counsel was ineffective. The Court held that;

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 466 U.S. at 687, 80 L.Ed. 2d at 693.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.C.A. 76-6-202 BURGLARY,

(1) An actor is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit:

(a) a felony:

(b) theft:...

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

U.C.A 76-6-404 THEFT.

A person commits theft if he obtained or exercised unauthorized control over the property of another with the purpose to deprive the owner thereof, and the actor has been twice before convicted of theft or it is a class B misdemeanor if the value is less than $300 and it is a Second degree felony if the value is greater than $5,000.00.

UTAH CONSTITUTION

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable

cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

UNITED STATES CONSTITUTION

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole

number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition

The appellant was charged by way of information with eight counts. R. 1. The defendant proceeded to have a jury trial. At the trial the defendant was convicted of eight counts. R. 172.

B. Statement of Facts

1. In November of 2005, the State alleged Mr. Scott along with his son Chris Scott, went to an area up Blacksmith Fork Canyon, in Cache County. They alleged Mr. Scott with his son broke into cabins in that area on four different occasions with the intent to commit a theft and did indeed steal items from theses cabins in the excess value of $5,000 dollars and on two occasions stole firearms. R. 107.

2. The State called a Mr. Dennis Weaver to testify R. 207 P. 120-154. Mr. Weaver owned a cabin that was burglarized. We set forth the portion of his testimony that helped the State's case and the portion that hurt their case.

    a. The portion of his testimony which was helpful to the State's case is as follows: Mr. Weaver testified that he knows defendant because he renting land to him in Weber County for defendant to store vehicles on.

He testified that defendant stored 80+ cars on property and city asked Mr. Weaver to have them moved. Mr. Weaver gave defendant $200 so he could pay rent on new piece of land to move the cars to. He testified that his family gave defendant food and gifts for Christmas one year. Mr. Weaver reported a break-in October 26th 2005, and nothing was stolen. He testified that in December he noticed two cabin doors had signs of forced entry, several cans of food, several batteries used for powering cabin, valuables from his wife's jewelry box, a Craftsmen power drill, three flashlights, a .22 rifle, two pairs of binoculars, a spotting scope etc... He testifies that defendant has been to his cabin and knows where it is.

b. The portion of his testimony that was detrimental to the State's case is as follows On cross-examination Mr. Weaver admitted that the Craftsmen power drill that was returned to him by the police only looked like his. He couldn't confirm that it was definitely his via serial number etc.. R. 207 P. 133 Mr. Weaver identified a flashlight in a photo that he stated was missing when he visited his cabin in December. He then states that he didn't actually know that the flashlight was missing until it was returned to him by the police, so his previous statement about it missing when he visited the cabin in December couldn't be true. This calls into question the statements he makes about noticing things missing on that visit in December.

c. Furthermore, Mr. Weaver can't explain why he assumed that the gate lock had been drilled. He testifies that police didn't make contact with him for 3-5 days after he reported the incident.

3. The State called a Mr. Roger to testify R. 207 P. 155-184. Mr. Weaver owned a cabin that was burglarized. We set forth the portion of his testimony that helped the State's case and the portion that hurt their case.

a. The portion of his testimony that was helpful to the State's case is as follows: He testified that the cabin was broken into and a drill with batteries, solar panels, liquor, an air compressor (which he identified by markings), light fixtures (has box it was shipped in with his name on it), a satellite dish, a jig saw, a Big Tex trailer, DVDs, black powder pistol, a crossbow and long bow with arrows, knives, a pair of walkie-talkies, .22 ammo, two pairs of binoculars, etc.., were stolen.

b. The portion of his testimony that is helpful to the defendant and hurts his credibility as a witness is his own wrongdoing. – He admitted that he has since been prosecuted for giving a false accounting of what was missing to law enforcement. He also admitted to committing a theft thirty years ago. He had stolen a TV as collateral from a friend who owed him money. On Cross-Examination, he testified that he was going to try to collect insurance money for the trumped up value of the items missing. He didn't think that the police was going to recover the items so he tried to use a fraudulent insurance claim to recoup some money. He added numerous

expensive things to the list of missing items that he had never owned. He was charged with providing false information to a police officer and was on probation when he testified. R. 207 P. 174.

4. The State called a Cynthia Scott to testify R. 207 P. 185-213 . Ms. Scott was the defendant's ex-wife. They were married for 18 years and were in a custody battle when she testified. We set forth the portion of her testimony that helped the State's case and the portion that hurt their case.

a. The portion of her testimony that was beneficial to the State is as follows: She testified that Mr. Weaver helped the family a great deal by providing property for them to stay on, food, and help in finding odd jobs for Mark Scott to do. She testified that her son Christopher and Mr. Weaver were good friends. She testified that Mark told her, in Christopher's presence, that he was going to see what he could get out of Mr. Weaver because he thought that he owed him for what he lost on the property they were staying at. She testifies that some time after saying this he came home with several items that matched the description of what had been stolen from Mr. Weaver's cabin, like canned food, clothes, liquor, and a rifle. R. 207 P. 189. She testified that upon returning home with these items he told her that he saw some other cabins that he wanted to check out. He left the next night with his sons Brandon and Christopher and came back with more items. She testified that she has seen the rifle in her trailer before and after she left the defendant. R. 207 P. 201

b. The portions of her testimony that would be beneficial to defendant is as follows: On Cross-Examination, She testified that she and her son Christopher left Mark Scott in July 2006 and moved in with a Jeff Evans whom she was romantically involved with. It wasn't until November of 2006 that she took Christopher to the police so he could tell them about the thefts at the cabin. She did not give any information about what the defendant had allegedly said about getting something out of Mr. Weaver's cabin, her son's Brandon's involvement, or the items that were brought to her home by the defendant. At this trial was the first time that she offered any of these facts. She testified that she has a felony conviction for possession of methamphetamine. This charge took place in July of 2006 around the time that she left the defendant. She admitted that her methamphetamine conviction will negatively impede her desire to get custody of Christopher. She admits to providing Christopher with methamphetamines and using them with him. She states that the last time Christopher used drugs was over a year ago. She testified that Christopher has never had a truancy problem then admits moments later that he actually had one when he was in the eighth grade. R. 207 P. 203.

5. The State called Christopher Scott to testify R. 208 P. 3-49. Christopher Scott is the defendant's son who admitted to committing these crimes with his father. We set forth the portion of his testimony that helped the State's case and the portion that hurt their case.

a. The portion of his testimony that was beneficial to the State's case is as follows: He testified the defendant talked about burglarizing Mr. Weaver's cabin. He testified he and the defendant broke into and burglarized some cabins in October 2005. He testified that the defendant drilled out the locks on the gate to get in. At that time, they stole some canned food. He testified that the defendant used bolt cutters to remove the lock from Mr. Weaver's gate. He testified the defendant pried the back door of Mr. Weaver's cabin open with a pry bar when they burglarized it in December 2005. He testified he and the defendant stole batteries out of Mr. Weaver's cabin and loaded them into the defendant's Bronco. He testified they stole food, a .22 rifle, a spotting scope, a power inverter, and a pair of binoculars. He testified that he saw the rifle they stole in Ricochet Trucking's shop. He testified the following day he and the defendant burglarized Mr. Godfrey's cabin. He testified that they stole a Honda generator, two solar panels, batteries, food, alcohol, a trailer, and a .22 rifle. He testified that the defendant, Brandon, and he went back to Mr. Weaver and Mr. Godfrey's cabins later. On that occasion, they stole a large amount of alcohol. He testifies that in 2006 the defendant hit his mother. R. 208 P. 30.

b. The portion of his testimony that is beneficial to the defendant is as follows: He testified that when he told the police about these events that he told them that the burglaries took place over two nights. This contradicts his testimony during this trial because he stated that the

burglaries occurred over four nights. He cannot explain the reason for the discrepancies in his accounts of the events. He admits that he initially omitted Brandon's involvement in the burglaries on the fourth night. He admits that his accounts of stealing the rifle and breaking into Mr. Weaver's cabin the first time have changed since his original statements to the police. During the preliminary hearing, he testified that he and the defendant never wore gloves but during the trial, he testifies that they used gloves on two occasions. He reads his written statement. R. 208 P. 40.

SUMMARY OF ARGUMENTS

The appellant asserts that the Trial Court erred in not dismissing the charges against him. The testimony of the witnesses for the State were lacking in reliability and credibility. One witness attempted to commit insurance fraud and lied to the police. The defendant's ex-wife is a drug addict and was attempting to get custody of their son. She is a drug dealer and supplied and used drugs with the defendant's son. The defendant's son uses drugs, waited over a year before reporting this to the police and had many inconsistency in his statements.

Trial counsel was ineffective for not making a motion to arrest the judgment.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO ENTER A DIRECTED VERDICT OF AQUITTAL AT THE CLOSE OF THE PROSECUTIONS CASE FOR REASONS THAT THERE WAS INSUFFICENT EVIDENCE TO SUPPORT A CONVICTION.

The Defendant recognizes the difficult burden he must overcome in challenging a trial court's failure to dismiss for lack of evidence. The court's power "to review a jury verdict challenged on grounds of insufficient evidence is limited." *State v. Rudolph*, 3 P.3d 192, 196 (2000). The Utah Supreme Court has said, "[s]o long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." *State v. Mead* 27 P.3d 1115, 1132 (Utah 2001) (citations omitted). Additionally, in *State v. Workman*, 852 P.2d 981, 984 (Utah 1993) the Court stated, "ordinarily, a reviewing court may not reassess credibility or reweigh the evidence, but must resolve conflicts in the evidence in favor of the jury verdict."

The Utah Appellate Courts have, however, ruled that absent sufficient evidence establishing each element of the offense charged, an Appellate

Court may overturn a conviction. In *State v. Workman*, *infra at 985*, the Utah Supreme Court affirmed the trial court's arrest of judgment from a conviction of sexual exploitation of a minor holding: "A guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt." In that case, the prosecution presented no evidence, expert or otherwise, that the photograph in question could have been taken for purposes of sexual arousal. Given that lack of evidence the Court vacated the defendant's guilty verdict. Similarly, in the case of *State v. Petree*, 659 P.2d 443 (Utah 1983) the Court reversed the conviction of a defendant in a second degree murder case where the evidence as to intent was deficient. In that case there was undisputed evidence that the victim had been murdered. The sole evidence against the defendant consisted of the fact that the defendant was the last person seen with the victim, and the fact that he had related a dream to three individuals in which he recalled slapping the girl and that he "thought he hurt her. He thought he might have killed her." *Id.* at 446. In that case, the Court also stated:

> The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict. The evidence, stretched to its

> utmost limits, must be sufficient to prove the defendant guilty beyond a reasonable doubt. *Id.* at 444-445.

Furthermore, in the case of *State v. Shumway*, 63 P.3d 94 (Utah 2002) the Utah Supreme Court reversed the trial court's conviction of evidence tampering. In that case, there was some expert testimony that opined that a second, smaller knife had also been used in a murder of an individual. No other evidence as to a second weapon (the first weapon was recovered) was found, but rather, the prosecution relied on an inference that the defendant had the motive and opportunity to dispose of a second weapon. In reversing that conviction, the Court held:

> After giving full weight to all of the evidence supporting [the defendants] conviction of evidence tampering, we conclude that the evidence is insufficient to sustain his conviction. At most, the evidence supports only the proposition that [the defendant] had the opportunity to destroy or conceal the second implement, if indeed it ever existed. *Id.* at 100.

While the Defendant is cognizant of the requirement to marshal evidence in support of the jury's verdict, the Defendant submits that even with an extensive marshaling of evidence (which he has done in the setting forth the facts) the jury's verdict cannot be supported

The defense pointed out that it is very obvious in this case that there is a lot of inconsistent in testimonies. There were at least a few things said by

almost everyone who testified, that were inconsistent with previous statements.

All of this notwithstanding, the State failed to prove all of the elements of alleged crimes. For this reason, the trial court should have dismissed the case. The evidence was insufficient to convict the Defendant of the crimes he was charged with. Furthermore, all three elements of a plain error claim are present. The error exists. The error being that the State failed to prove all of the elements of the offenses. Number two, this error should have been obvious to the trial court. The final element is that the error was harmful. Based on the insufficiency of the evidence the Defendant should not have been convicted. Therefore, he was prejudiced by the court's failure to dismiss the case and his convictions should be reversed.

The Appellant Court should dismiss the instant case. The appellant has marshaled the evidence set forth at the trial. The trial court heard the evidence and should have granted the appellant's motion after the State's case in chief. The credibility of the State's witnesses was so lacking the Court had a duty to grant the motion made by the defendant.

Point II

THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS SEVEN AND TWELVE OF THE UTAH CONSTITUTION BY HIS ATTORNEY'S FAILURE TO MOVE THE TRIAL TO ARREST THE JUDGMEMT

The United States Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692 (1984). In *Strickland,* the Supreme Court established a two-part test to determine whether counsel's assistance was ineffective. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington,* 466 U.S. at 687, 80 L.Ed.2d at 693.

In making that assessment, the Court in *Strickland v. Washington* gave some guidance in noting, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Although the Court in Strickland did not "exhaustively define the

obligations of counsel nor form a checklist for judicial evaluation of attorney performance", *Id.* at 688, it did mention certain minimal requirements. These duties include, "a duty of loyalty, a duty to avoid conflicts of interest" as well as a duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution" *Id.* at 688. Additionally, the overreaching requirement by the Supreme Court in ineffective assistance of counsel cases is that the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.

Several other cases more specifically define when a defense counsel's performance has slipped below the threshold cited above.

In the case of *Kimmelman v. Morrrison*, 477 U.S. 365 (1986) the Court was presented with a case where defense counsel, due to a failure to conduct proper discovery, did not timely file a motion to suppress evidence under the 4th Amendment. The Supreme Court found the attorney's performance to be deficient. The Court stated:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. *Kimmelman v. Morrrison*, 477 U.S. 365, 375 (1986).

In making the determination that trial counsel's conduct failed to comport with constitutional requirements the Court held:

> In this case, however, we deal with a total failure to conduct pretrial discovery, and one as to which counsel offered only implausible explanations. Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [citation omitted] Under these circumstances, although the failure of the District Court and the Court of Appeals to examine counsel's overall performance was inadvisable, we think this omission did not affect the soundness of the conclusion both courts reached — that counsel's performance fell below the level of reasonable professional assistance in the respects alleged. *Kimmelman v. Morrrison*, 477 U.S. 365, 386 (1986).

The Utah Appellate Courts have adopted the *Strickland* test and have likewise rendered decisions in ineffective assistance of counsel cases that can guide a determination of when a defense attorney fails in his appointed duties.

In *State v. Smith*, 65 P. 3d 648, 656 (Utah Ct. App. 2003) this Court reversed a defendant's conviction under an ineffective assistance of counsel theory where counsel "fail[ed] to move for a directed verdict after the State failed to present evidence that Smith did not possess a valid concealed weapon permit during its case in chief."

In the present case, defense counsel failed to make a motion to arrest the judgment. Assuming arguendo that defense counsel failed to make a

motion to the trial court that the trial court would have granted, this failure, and this failure alone would constitute ineffective assistance of counsel under the definition of *Strickland* and it's Federal and State progeny. The general practice of defense counsel in criminal trials is to move for a motion to arrest the judgment. This is especially true when the conviction is not based on substantial reliable evidence.

"A conviction not based on substantial reliable evidence cannot stand." State v. Ramsey, **782 P.2d 480**, **483** (Utah 1989) (finding insufficient evidence to sustain a jury verdict convicting the defendant of sexual abuse of a child). On a motion to arrest judgment, the court may only reverse a jury verdict when "the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." State v. Bluff, **2002 UT 66**, **63**, **52 P.3d 1210** (internal quotation marks omitted); see also State v. Workman, **852 P.2d 981**, **983** (Utah 1993). "When reviewing any challenge to a trial court's denial of [a motion to] arrest . . . judgment, the court should review the evidence and all reasonable inferences that may fairly be drawn there from in the light most favorable to the jury verdict." State v. Colwell, **2000 UT 8**, ¶ **11**,

994 P.2d 177; see also State v. Fedorowicz, 2002 UT 67, ¶ 40, 52 P.3d 1194 (stating that court must "assume that the jury believed the evidence that supports the verdict"). A jury can convict on the basis of the "uncorroborated testimony of the victim." State v. Sisneros, 581 P.2d 1339, 1343 (Utah 1978); see also Bowles v. Indiana, 737 N.E.2d 1150, 1152 (Ind. 2000) ("A victim's testimony, even if uncorroborated, is ordinarily sufficient to sustain a conviction for child molesting.").

"The standard for determining whether an order arresting judgment is erroneous is the same as that applied by an appellate court in determining whether a jury verdict should be set aside for insufficient evidence." Workman, 852 P.2d at 984. Normally, a trial court's denial of a defendant's sufficiency of the evidence challenge lends further support to the jury's verdict. Bluff, 2002 UT 66, ¶ 63.

"Notwithstanding the presumptions in favor of the jury's decision this Court still has the right to review the sufficiency of the evidence to support the verdict." State v. Petree, 659 P.2d 443, 444 (Utah 1983). Though the court must ordinarily accept the jury's determination of witness credibility, when the witness's testimony is inherently improbable, the court may choose to disregard it. Workman, 852 P.2d at 984. Importantly, when reviewing the sufficiency of

the evidence, the "burden of proof . . . may under appropriate circumstances affect the degree of deference extended by an appellate court to findings of fact." State ex rel. Z.D. v. State, **2006 UT 54**, ¶ **27**, **147 P.3d 401**. It is "more difficult to demonstrate that the evidence supporting a `preponderance' based outcome is so wanting . . . than it is to demonstrate the required dearth of evidence under a more exacting evidentiary standard." Id. . In a criminal case, where the burden of proof is beyond a reasonable doubt, the trial court may afford less deference to inherently improbable, inconsistent, uncorroborated witness testimony than in a civil case where the plaintiff must only establish its claim by a preponderance of the evidence. "The evidence, stretched to its utmost limits, must be sufficient to prove the defendant guilty beyond a reasonable doubt." Petree, **659 P.2d at 445**. In Workman dicta that witness testimony is inherently improbable and may likewise be disregarded if it is (1) physically impossible or (2) apparently false. **852 P.2d at 984**.

Testimony is physically impossible when what the witness claims happened could not have possibly occurred. If Taylor had testified that the molestation occurred on the moon, her testimony would have been inherently improbable because it is physically impossible for that to

have occurred. On the other hand, testimony is apparently false if its falsity is "apparent, without any resort to inferences or deductions." Id. (internal quotations marks omitted). The court of appeals applied a narrow definition of "apparently false," holding that it required the testimony to be "improbable by its very nature." State v. Robbins, **2006 UT App 324**, **17**, **142 P.3d 589**. It also held that "the inherently improbable testimony must . . . go to the very core of the offense." Id. 18. Under this interpretation, unless the witness's testimony is impossible, not just incredible, and concerns the core elements of the crime, not just the circumstances surrounding it, the judge must uphold the jury's verdict. Such a standard is narrow to the point of being meaningless. Substantial inconsistencies in a sole witness's testimony, though not directed at the core offense, can create a situation where the prosecution cannot be said to have proven the defendant's guilt beyond a reasonable doubt, particularly as here where other significant factors in the case suggest a lack of credibility.

To prevent unappealable injustice, Utah Courts have held that the definition of inherently improbable must include circumstances where a witness's testimony is incredibly dubious and, as such, apparently false. Accordingly, when considering a motion to arrest judgment, a trial judge

may reevaluate the jury's determination of testimony credibility in cases "where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt." Bowles, **737 N.E.2d at 1152**; see also Iowa v. Smith, **508 N.W.2d 101**, **103** (Iowa Ct.App. 1993) ("`The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court.'" (quoting Graham v. Chi. & Nw. Ry. Co., 119 N.W. 708, 711 (Iowa 1909))). The court may choose to exercise its discretion to disregard inconsistent witness testimony only when the court is convinced that the credibility of the witness is so weak that no reasonable jury could find the defendant guilty beyond a reasonable doubt.

In the present case there is simply no reason for trial counsel not to move the court to arrest the judgment when the evidence against the Defendant was so unreliable. This failure clearly fulfills the first prong of the *Strickland* test.

The second prong of the test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* at 466 U.S. at 687, 80 L.Ed. 2d at 693. Again, in the case of *State v. Smith*, 65 P. 3d 648, 655 (Utah Ct. App. 2003) this Court

ruled that "[h]ad trial counsel raised this lack of evidence, there is a reasonable probability that the trial court would have dismissed the concealed weapon charge."

In the present case, counsel should have move the court for a motion to arrest the judgment The jury should not have found the defendant guilty based upon the lack of credible evidence.

After the jury returned a verdict of guilty, the trial counsel should have made a motion to arrest the judgment. The reliability and credibility of the witnesses was so lacking that the trial attorney should have given the Court another opportunity to set aside the jury verdict.

CONCLUSION

The trial court should have granted the defendants motion to dismiss the case because the inconsistencies and unreliability of the witnesses was so great the State failed to prove its case.

The defendant should have moved the court to arrest the judgment because the main witnesses who's testimony was most damaging was unreliable. He had waited for over a year to make the false accusation. It was at the insistence of his mother who had left the defendant for another man. She wanted to obtain custody of her son. He gave conflicting versions of what had occurred.

DATED this 30 day of April, 2009

David M. Perry

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT postage prepaid to the Attorney General's Office, 160 East 300 South, 5th Floor, P.O. Box 140814, Salt Lake City, Utah 84114-0814

DATED this 30 day of April, 2009.

No ADDENDA to this brief